

OS REGISTRY

8 DEC 1977

MEMORANDUM FOR: Legislative Counsel

STATINTL FROM:

[REDACTED]
Acting Director of Security

SUBJECT: Intelligence Activities and
Individual Rights Act of 1977

1. This Office has reviewed John Elliff's list of 23 questions of 21 November 1977.

2. We have concluded that the only one that impacts directly upon the Office of Security is Question #3 which deals with the use of "cover" and "pretext", and we do not believe we need any further exceptions or modifications, providing Section 207(g) of the proposed Intelligence Activities and Individual Rights Act of 1977 stands as now written and that, as we assume, we will have no problem in securing the approval of the Attorney General.

STATINTL 3. As an aside, at the conclusion of our last meeting with John Elliff on 10 November 1977, John apprised [REDACTED] of this Office that he did not feel that the provisions of Section 207(g) applied to Office of Security activities but were more directed towards DDO national foreign intelligence and foreign counterintelligence activities. It would appear that this question should be given a full airing at our next meeting with Mr. Elliff to fully clarify the issue.

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8 December 1977

23 November 1977

OLC 77-5141

STATINTL MEMORANDUM FOR: [redacted] SA/DO/O
[redacted] DDS&T
Office of Security

SUBJECT: Attached Memorandum from John Elliff, SSCI Staff Member

1. Recently representatives of the Office of Security, OGC, OLC, DDO and the SSCI met to discuss a Charter Revision DRAFT, Title II, entitled "Intelligence Activities and the Rights of Americans," prepared and submitted by the SSCI.

2. The attached are follow-up questions subsequently submitted to this office by the SSCI.

3. I am forwarding the attached for your review and solicit your assistance in preparing a response. The response might be prepared in one of two ways:

a. written comments submitted by your elements, which comments would be incorporated into an OLC formal response or

b. a mutually convenient meeting wherein your concerns may be aired.

If written comments are to be submitted, a deadline of COB 30 November will be necessary in order to allow sufficient time to incorporate your comments into our response.

STATINTL 4. Please contact me or [redacted] to discuss procedural preferences.

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[redacted]
Office of Legislative Counsel

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cc:

AIC #77-5119

STATINTL

Q# 802

MEMORANDUM

To:
From: John Elliff *JTE*
Date: November 21, 1977
Subject: Title II Questions

Attached is the first installment of a list of specific questions relating to Title II of the draft charter legislation. These questions should serve two purposes. First, they should be an agenda for our discussion in the near future regarding the next draft. Second, they should be the basis for written answers to be provided by December 12, 1977, for the Committee's reference.

I hope you will understand why we are asking you to provide cases and other information supporting the need to relax the restrictions in the 10/3/77 draft of Title II.

Additional questions will be forthcoming.

JTE/mhp

Attachment

TITLE II - QUESTIONS

6X 00

(1) Vice President Mondale has stated that charter legislation will "prohibit conduct such as the [] program of covert harassment." This prohibition may cover the following activities by intelligence agencies within the United States or directed against U.S. persons abroad:

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- committing, instigating, or advocating criminal acts;
- inciting or provoking violence;
- using overt or covert investigative techniques for purposes of harassment;
- interfering with or disrupting lawful speech, publication, assembly, organizational activity, or association;
- disseminating false or misleading information;
- disseminating information anonymously or under a false identity;
- disseminating damaging or derogatory information for the purpose of holding any person up to scorn, ridicule, or disgrace, or for the purpose of discrediting any person because he or she has criticized any official or agency of the government or any policy of the government.

Should any prohibitions be added? Should any of these prohibitions be deleted or modified? If so, please provide alternative language and give example cases to support such language.

(2) In order to permit foreign counterintelligence "preventive action," should these prohibitions exempt:

- furnishing true or false information, including derogatory information, to foreign intelligence services or foreign terrorists through "double agents" or otherwise;

- recruiting foreigners as covert human sources by bringing pressure to bear upon them?

If so, please provide suggested language and example cases to support the exemptions.

(3) Are additional exceptions to or modifications in these prohibitions needed to permit intelligence agencies to:

- maintain necessary "cover" for intelligence activities and for employees or covert human sources engaged in clandestine intelligence activities;
- conduct interviews or other activities involving the use of false identification or other "pretext" techniques which conceal the government affiliation of an employee or contractor of an intelligence agency?

If so, please provide suggested language, with supporting cases.

(4) Should alternatives be considered to a statutory prohibition against the use of "unconsented physical searches" within the United States or directed against U.S. persons abroad for foreign intelligence or counterintelligence purposes, except under the standards and procedures required by the Constitution or laws of the United States for the conduct of such searches for law enforcement purposes? If so, please provide suggested language, with supporting cases.

(5) Should alternatives be considered to a statutory prohibition against opening of mail in United States postal channels or opening of mail abroad of a known U.S. person; except under the standards and procedures required by the

Constitution or laws of the United States for the opening of mail for law enforcement purposes? If so, please provide suggested language, with supporting cases.

(6) Should the intelligence activities authorized and regulated in the proposed charters include the collection of information relating to, or the conduct of activities to protect against, any terrorist or violent activities not conducted for or on behalf of foreign powers, organizations, or persons? If so, please provide descriptions of such types of violent or terrorist activities, with supporting cases, and specify whether the activities constitute:

- international terrorist activities;
- activities outside the United States that present a danger to the safety of a person protected by the U.S. Secret Service or the Department of State;
- activities that pose a clear threat to any facility or personnel of an agency within the Intelligence Community.

(7) The proposed charters may prohibit initiating foreign counterintelligence investigations of U.S. persons, or initiating the intentional collection of non-publicly available foreign counterintelligence information concerning the activities of U.S. persons, without their consent, unless the U.S. person:

- is reasonably believed to be engaged in espionage or other unlawful clandestine intelligence activities, sabotage, international terrorist activities, or assassinations for or on behalf of foreign powers, organizations, or persons;

- has contact with a non-U.S. person who is the subject of a foreign counterintelligence inquiry, but only to the extent necessary to identify such U.S. person;
- is reasonably believed to be the object of a recruitment effort by a foreign intelligence service or by international terrorists;
- is reasonably believed to be engaged in activities, or to possess information or property, which are the target of international terrorist activity or are the target of intelligence activity by a foreign intelligence service;
- is reasonably believed to be a potential source of operational assistance in the conduct of authorized foreign counterintelligence activities.

If any necessary inquiries would be prevented by such standards, please provide alternative language needed to permit such inquiries, with supporting cases.

(8) Would it be workable to require written approval by a senior intelligence official at agency headquarters for any inquiry in the latter three categories, based upon his finding that requesting the consent of the U.S. person risks disclosure of sensitive counterintelligence sources or methods? If not, please provide supporting information, such as the extent of such inquiries and the degree to which they risk disclosure of sensitive sources or methods.

(9) Please evaluate, with supporting cases, the practicality of each of the following alternatives for limiting the duration of inquiries in the latter three categories:

- limitation to 90 days, or another fixed time-period;

- limitation to such a fixed time-period, plus a provision allowing a senior intelligence official at agency headquarters to grant a 90-day extension based on his written finding that information obtained in the original period justifies the extension;
- a different fixed time-limit, with or without an extension provision, for inquiries conducted abroad;
- procedures approved by the Attorney General specifying a reasonable duration for such inquiries and reasonable requirements for the granting of extensions of initial inquiries by senior intelligence officials at agency headquarters based on written findings by such officials that information obtained in the initial inquiries justifies the extensions.

(10) Would it be practical to require such procedures approved by the Attorney General for the conduct of inquiries in the first two categories listed in question (7). If not, please explain with supporting cases.

(11) Would it be too burdensome on either the Attorney General or the agencies to require that:

- the agencies notify the Attorney General or his designee in a timely manner of the initiation of all foreign counterintelligence inquiries listed in question (7);
- the Attorney General or his designee review all such inquiries at least annually to determine whether they have satisfied the standards set forth in question (7) and any procedures approved by the Attorney General?

If so, please provide supporting information, such as the extent of the workload or other specific difficulties with notification or review.

(12) What modifications, if any, are needed in the standards set forth in question (7) for inquiries about non-U.S. persons within the United States? Please provide suggested language,

if needed, with supporting cases.

(13) Please evaluate, with supporting cases, the practicality of a statutory prohibition against initiating investigations of U.S. persons, or initiating the intentional collection of non-publicly available information concerning the activities of U.S. persons, without their consent, solely on the basis of their lawful speech, publication, assembly, organizational activity, or association, and in the absence of any other information satisfying the standards in the charter for initiating such investigations or collection.

(14) The proposed charters may prohibit initiating the intentional collection of non-publicly available foreign intelligence information concerning the activities of U.S. persons, without their consent, unless the U.S. person:

- is reasonably believed to be engaged in espionage or other unlawful clandestine intelligence activities, sabotage, international terrorist activities, or assassinations for or on behalf of foreign powers, organizations, or persons;
- is an officer or employee of a foreign power reasonably believed to be residing abroad at the time and place of collection and to be responsible for activities which involve significant foreign intelligence information.

If necessary inquiries would be prevented by such standards, please provide alternative language needed to permit such inquiries, with supporting cases.

(15) Would it be too burdensome on either the Attorney General or the agencies to require that:

- the Attorney General or his designee must, absent exigent circumstances, approve the initiation of all such inquiries based on his written finding that the techniques proposed to be used are necessary to acquire significant foreign intelligence and that other means are inadequate;
- the Attorney General or his designee must review all such inquiries at least every 90 days to determine whether they continue to satisfy these requirements?

If so, please provide supporting information, such as the extent of the workload or other specific difficulties with such approval and review.

(16) As an alternative to (15), would it be too burdensome on the agencies and the Attorney General to require that a senior intelligence official at agency headquarters perform such approval and review functions and that:

- the agencies notify the Attorney General or his designee in a timely manner of the initiation of such inquiries;
- the Attorney General or his designee review all such inquiries at least annually to determine whether they have satisfied the standards and requirements, including the requirement that the techniques used be necessary to acquire significant foreign intelligence information and that other means be inadequate?

If so, please provide supporting information, as in question (15).

(17) The proposed charters may prohibit initiating any other foreign intelligence collection activity which is reasonably expected to result in the incidental collection of substantial non-publicly available information concerning the activities of U.S. persons, without their consent, unless:

- the collection activity is necessary to obtain information about foreign powers, organizations, or persons;
- other means of acquiring the information without such incidental collection concerning U.S. persons are inadequate; and
- the collection activity is carried out under procedures approved by the Attorney General reasonably designed to minimize the incidental acquisition of information concerning U.S. persons which does not meet the standards for use or dissemination of information concerning U.S. persons.

Please evaluate the practicality of such a prohibition, with supporting cases or information.

(18) Please evaluate, with supporting cases or information, the practicality of requiring either the Attorney General or his designee, or a senior intelligence official at agency headquarters, to approve the initiation of such collection activities, absent exigent circumstances, and to review them at least every 90 days. Also, please evaluate the alternative of requiring notification to, and annual review by, the Attorney General or his designee in a manner similar to that suggested in question (16).

(19) The charters may exempt from the prohibition against initiating the intentional collection of non-publicly available information concerning the activities of U.S. persons, without their consent, a U.S. person who is reasonably believed to be a potential source of operational assistance in the conduct of authorized foreign intelligence activities. Please discuss,

with supporting cases, whether any additional exception is necessary to cover other "potential sources or contacts," as provided in the executive order.

(20) Would it be workable to require written approval by a senior intelligence official at agency headquarters for any such "potential source" inquiry, based upon his finding that requesting the consent of the U.S. person risks disclosure of sensitive intelligence sources or methods? If not, please provide supporting information, such as the extent of such inquiries and the degree to which they risk disclosure of sensitive sources or methods.

(21) Please evaluate, with supporting cases or information, the practicality of applying to such inquiries the procedures suggested in questions (9) and (11).

(22) Should the charters exempt from the prohibition against initiating the intentional collection of non-publicly available information concerning the activities of U.S. persons, without their consent, a U.S. person who has contact with a non-U.S. person who is the subject of a foreign intelligence inquiry, but only to the extent necessary to identify such U.S. person? If so, please provide supporting cases justifying such an exemption.

(23) Should the charters exempt from this prohibition a U.S. person who is a former employee of an agency of the Intelligence Community, a former contractor, or a former

employee of a contractor or former contractor, to the extent necessary to protect foreign intelligence or foreign counterintelligence sources or methods or national security information from unauthorized disclosure? If so, please provide supporting cases justifying such an exemption and explain why it may be impractical to limit such inquiries to criminal investigations and foreign counterintelligence inquiries.

JTE/mhp

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